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ASSASSINATION AND THE LAW OF ARMED CONFLICT

A Thesis

Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the author and do not necessarily reflect the views of either The Judge Advocate General's School, the United States Army or any government agency.

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39th JUDGE ADVOCATE OFFICER GRADUATE COURSE

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by Lieutenant Commander Patricia Zengel

ABSTRACT: This thesis examines the development of the customary prohibition of assassination during time of war and concludes that there is no longer any convincing justification for retaining a unique rule of international law that treats assassination apart from other uses of force. It then examines assassination as a domestic political issue and concludes that it is better addressed in the context of the use of force generally by the United States against foreign nations.

I. INTRODUCTION

The availability of assassination of foreign leaders as a means of achieving United States foreign policy objectives is an issue which has proven in recent years to be a recurring one. It does not, however, arise in isolation; instead it is almost always part of a larger political controversy over United States foreign policy objectives and whether force of any kind should be used to pursue them. Certainly this was true with regard to the controversies that surrounded United States policy, including alleged involvement in assassination plots, toward Cuba, Vietnam, the Congo and the Dominican Republic in the 1960s and toward Chile in the early 1970s. It is also true, though to a lesser degree, of more recent debates concerning the United States air strike against Libya in April 1986, and the role of the United States in Panama prior to the December 1989 invasion. In each case there was, or later developed, significant disagreement over the appropriateness of United States policy toward the nation involved, and the use of force to induce changes in the nature or

activities of its government.

Inevitably, such disagreements have tended to distract attention from the issue of the manner in which force might be applied: if the chosen objective appears not to be a legitimate one or if the use of force seems unjustified, the relative merit of an attack on a military installation, for example, as opposed to the assassination of a single individual is unlikely to be seriously or productively considered. The recent war in the Persian Gulf has again revived the controversy and provided a new opportunity for debate. This time, however, the issue appeared more starkly framed than previously. Public doubt as to the legitimacy of the immediate objective- the ejection of Iraq from Kuwait- was for the most part absent, and although there was disagreement about the timing and amount of coercion to be used, force was generally perceived as a legitimate option. Far from presenting a sympathetic image, Iraqi President Saddam Hussein was perceived by the American public as probably the least ambiguous villain of the second half of the twentieth century. Unchallenged by any significant political

opposition prior to the war, he appeared as the sole instigator of Iraq's seizure of Kuwait, as well as the cause of its intransigence in the face of international insistence that it withdraw.

These circumstances prompted a number of knowledgeable individuals, both within and without the United States government, to suggest that killing Saddam might actually prove faster, more effective and less bloody than killing his army in resolving the problem of Iraq.¹ Public discussion touched lightly on the feasibility of such action and the likelihood that it would succeed in its purpose, but focused primarily on the legality of active efforts by the United States to bring about the Iraqi President's death. The answer offered to that question most often turned on whether killing Saddam Hussein would be an "assassination" within the meaning of a presidential ban on resort to assassination currently embodied in Executive Order 12333.² Argument on that issue inevitably must be unenlightening, in part because the order itself provide no guidance, but also because the argument is a circular one: to determine that a particular killing

was illegal leads directly to the conclusion that it is by definition an assassination, and conversely, if not illegal it is not assassination. There was little discussion of international law concerning assassination.

In fact, because this issue inescapably involves relations between nations, any useful discussion of the circumstances in which it would be permissible for the United States to actively seek the death of a foreign leader must consider both international law, and whatever constraints the United States may see fit to impose upon itself. Since it is assumed that the killing of a foreign political or military leader in an attempt to influence another nation's leadership, foreign policy or military capabilities would amount to a use of force, generally prohibited under the United Nations Charter,³ unless justified as a defensive action,⁴ assassination will be discussed in the context of international law of armed conflict. It is the thesis of this paper that what is commonly called assassination is best treated as one of many means by which one nation may assert force against another, and

should be considered permissible under the same circumstances and subject to the same constraints as govern the use of force generally. It should not be viewed as a unique offense under international law or as a subject of statutory prohibition under the law of the United States.

II. INTERNATIONAL LAW REGARDING ASSASSINATION

Assassination as a tactic of war was a subject frequently discussed by chroniclers of international law writing during the seventeenth and eighteenth centuries. None of these authors asserted that a leader or particular member of an opposing army enjoyed absolute protection, or was not a legitimate target of attack. They focused the manner and circumstances in which such individuals could be killed, insisting that they not be subject to treacherous attack. The writings of most reflect concern that the honor of arms be preserved, and that public order and the safety of sovereigns and generals not be unduly threatened. Although their discussions clearly assumed that an individual specifically selected as a target would be a

person of some prominence, their concept of assassination did not, as will be seen, necessarily require an eminent victim.

A. Early Commentators

Alberico Gentili, writing early in the seventeenth century⁵, considered three possible situations: the incitement of subjects to kill a sovereign, a secret or treacherous attack upon an individual enemy, and an open attack on an unarmed enemy not on the field of battle. Gentili concluded that each of these was to be condemned. He argued that

if it is allowed openly or secretly to assail one man in this way, it will also be allowable to do this... by falsehood... If you allow murder, there are no methods and no forms of it which you can exclude; therefore murder should never be permitted.⁶

He feared the danger to individuals and general disorder that would result if opposing sides plotted

the deaths of each other's leaders. Just as important to Gentili, however, was the absence of valor:

.... accomplishment (victory) consists in the acknowledgement of defeat by the enemy, and the admission that one is conquered by the same honorable means which gave the other victory.... But if "no one says that the three hundred Fabii were conquered, but that they were killed;" and if the Athenians are said on some occasions to have been rather worn out than defeated, when they nevertheless fell like soldiers; what shall we think of those who fell at the hands of assassins?⁷

Gentili expressly rejected the suggestion that, by killing a single leader, many other lives might be saved, believing that such an argument ignored considerations of justice and honor. Moreover, he questioned the ultimate result: a new leader would emerge, with followers all the more inflamed by their previous leader's death. If, however, an enemy leader

was sought out and attacked on the field of battle, Gentili considered that to be entirely permissible.⁸

Hugo Grotius considered "whether, according to the law of nations, it is permissible to kill an enemy by sending an assassin against him."⁹ He distinguished between "assassins who violate an express or tacit obligation of good faith" such as subjects against a king, soldiers against superiors, or suppliants, strangers or deserters against those who have received them, and assassins who have no such obligation.¹⁰

Grotius considered it is permissible under the law of nature and of nations to kill an enemy in any place whatsoever, though he condemned killing by treachery or through the use of the treachery of another. He further condemned the placing of a price on the head of an enemy, apparently in part because such an offer implicitly encouraged treachery among those to whom it was directed, but also because, like Gentili, he disapproved of a victory that was "purchased."¹¹

Grotius, unlike Gentili, exonerated Pepin, the father of Charlemagne, who reputedly crossed the Rhine at night, slipped into the enemy camp, and killed the

enemy commander while he was sleeping.¹² Grotius went on to note that a person who commits such a deed, if caught, is subject to punishment by his captors, not because he has violated the law of nations, but because "anything is permissible as against an enemy," and it is to be expected that his captors will want to punish, and presumably discourage, attacks of that sort.¹³ The reason Grotius offered for forbidding the use of treachery with regard to assassination, but allowing it in other contexts- for example, the use of traitors as spies, was that the rule "prevent(ed) the dangers to persons of particular eminence from becoming excessive."¹⁴

Interestingly, Grotius believed that one attribute of sovereignty was the right to wage war,¹⁵ and that the prohibition of treacherous assassination applied only in the context of a "public war" against a sovereign enemy. Thus, one effect of forbidding the use of assassination was to protect kings in the exercise of their prerogative as rulers. Treachery used in fighting enemies who were not sovereign, such as "robbers and pirates," while not morally blameless,

Grotius said, "goes unpunished among nations by reason of hatred of those against whom it is practiced."¹⁶

Emer de Vattel rejected assassination as contrary to law and honor, but was careful to distinguish it from "surprises," that is, attacks by stealth. According to Vattel, if a soldier were to slip into an enemy's camp at night, make his way to the commander's tent and stab him, the soldier would have done nothing wrong- in fact, the soldier's action would be commendable.¹⁷ Vattel was firm in this opinion despite the inclination of others to disapprove of the taking of a sovereign's or general's life in battle. He observed:

Formerly, he who killed the king or general of the enemy was commended and greatly rewarded....(because)in former times, the belligerent nations had, almost in every instance, their safety and very existence at stake; and the death of the leader often put an end to the war. In our days, a soldier would not dare to boast of having killed the

enemy's king. Thus sovereigns tacitly agree to secure their own persons....In a war that is carried on with no great animosity, and where the safety and existence of the state are not involved....this respect for regal majesty is perfectly commendable....In such a war, to take away the life of the enemy's sovereign, when it might be spared, is perhaps doing that nation a greater degree of harm than is necessary....But it is not one of the laws of war that we should....spare the person of the hostile king¹⁸

Like Grotius, Vattel found no inconsistency in the fact that the perpetrator of such an act, if caught by the enemy, would be severely punished.¹⁹

Assassination, defined by Vattel as "treacherous murder," was an entirely different matter, "infamous and execrable, both in him who executes and in him who commands it."²⁰ In addition to believing such an act to be devoid of honor, Vattel thought that it would place in jeopardy the "safety and interest of men in

high command...(who) far from countenancing the introduction of such practices...should use all possible care to prevent it."²¹ Vattel evidently found no contradiction in citing the well-being of men in high command as one reason for proscribing killing in a manner he considered assassination, yet dismissing it as justification for a rule prohibiting the killing of an enemy king.

Vattel's perception of treachery appears to have been broader than that of Grotius in that Vattel includes within its scope killings perpetrated by "subjects of the party whom we cause to be assassinated, or of our own sovereign,- or that it be executed by the hand of any other emissary, introducing himself as a suppliant, a refugee, a deserter, or, in fine, as a stranger."²² Grotius' reference to a suppliant, stranger or deserter having been "received" by his intended victim is omitted, although in referring to an assassin "introducing himself" Vattel does seem to contemplate some affirmative misrepresentation on the part of the assassin.

With a view of war that may more closely correspond to that of modern times, and certainly less inclined than many of his contemporaries to see to see war as a contest of valor and honor, Bynkershoek, writing in 1737 on what force may properly be used in war, said:

...in my opinion every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy. I know that Grotius is opposed to the use of poison, and lays down various distinctions regarding the employment of assassins....But if we follow reason, who is the teacher of the law of nations, we must grant that everything is lawful against enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people. As this is the

object of our warfare, does it matter what means we employ to accomplish it?²³

Continuing, Bynkershoek observed that, since it is immaterial whether an enemy is fought with courage or with strategy, any manner of deceit or "fraud" may be used, except perfidy. By perfidy he meant the breaking of one's word or of an agreement, and excepted it "not because anything is illegitimate against an enemy, but because when an engagement has been made the enemy ceases to be an enemy as far as regards the engagement."²⁴

The consensus of these early commentators was that an attack directed at an enemy, including an enemy leader, with the intent of killing him was generally permissible, but not if the attack was a treacherous one. Treachery was defined as betrayal by one owing an obligation of good faith to the intended victim. Grotius and Vattel also objected to making use of another's treachery. Bynershoek, however, did not. He considered the only obligation of good faith owed to an enemy to be that of abiding by any agreements that had

been made with him. Gentili dissented, in effect declaring any secret attack to be treacherous, and limiting permissible attacks upon enemy leaders to those on, or in close proximity to, the battlefield.

The reasons given for restricting the manner in which an enemy might be personally attacked generally involved perceptions of what constituted honorable warfare, together with a desire to protect kings and generals (reasonably expected to be the most frequently selected targets) from unpredictable assaults against which they would find it difficult to defend themselves. Implicit in the latter was the premise that making war was a proper activity of sovereigns for which they ought not be required to sacrifice their personal safety.

B. Codification and Interpretation of the Customary Law

The first efforts to codify the customary international law of war appeared during the nineteenth century. The Lieber Code, promulgated by the United

States Army in 1863 as General Order No. 100:

Instructions for the Government of Armies of the United States in the Field, echoed Grotius and Vattel in providing:

The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers or rewards for the assassination of enemies as relapses into barbarism.²⁵

The Code was widely respected, and served as the basis for later Army manuals and for the Prussian Army code used during the Franco- Prussian War.²⁶

In 1865, James Speed, then Attorney General, concluded that there was reason to believe that John Wilkes Booth had acted as a "public enemy" (on behalf of the Confederacy rather than for private motives) in killing Abraham Lincoln, and that therefor his accomplices should be tried before a military tribunal for assassination, an offense he declared to be contrary to the law of war.²⁷ Speed cited Vattel's definition of assassination: a treacherous murder, perpetrated by any emissary introducing himself as a suppliant, refugee, deserter, or stranger.²⁸ Booth had come as a stranger- that is, as an anonymous member of the public, to the theatre where he shot Lincoln.

It was generally accepted that in time of war every enemy combatant was subject to attack, anywhere and at any time, so long as the method of attack was consistent with the law of war.²⁹ It was immaterial whether a given combatant was "a private soldier, an officer, or even the monarch or a member of his family."³⁰ Enemy heads of state and important government officials, if they did not belong to the

armed forces (that is, were noncombatants), were protected from attack in the same sense as were "private enemy persons."³¹

1. Deceit as treachery

It thus appears that assassination under customary international law is understood to mean the selected killing of an individual enemy by treacherous means. "Treacherous means" include the procurement of another to act treacherously, and treachery itself is understood as a breach of a duty of good faith toward the victim. There is little discussion of by whom and under what circumstances such a duty is owed; that which exists is generally confined to reiteration and quotation of earlier writers. Article 23(b) of the annex to Hague Convention IV (1907), generally considered to have embodied and codified the customary rule,³² itself provides no further enlightenment: it states merely that it is forbidden "to kill or wound treacherously individuals belonging to the hostile nation or army." Most attempts to elaborate on the meaning of treachery in the context of Art. 23(b) have

focused on the aspect of deceit: the "test of treacherous conduct... is the assumption of a false character, whereby the person assuming it deceives his enemy and so is able to commit a hostile act, which he could not have done had he avoided the false pretenses."³³ It should be noted that Article 23(b) is read to forbid other means of killing or wounding in addition to assassination. Treacherous requests for quarter, false surrender or the feigning of death, injury or sickness in order to put an enemy off guard are also considered proscribed.³⁴

2. Ununiformed attacks

Some have suggested that assassination could more usefully be defined as the "selected killing of an individual by a person not in uniform," with the element of treachery arising from the fact that the assassin's malevolent intent is deliberately hidden by the appearance of civilian innocence.³⁵ This approach evidently is derived from two conceptually related lines of reasoning. The first, already discussed, involves the evolution of the original concept of

treachery as a breach of an obligation of loyalty or good faith into a concept of treachery as any act involving deception regardless of the existence of an obligation of good faith on the part of the deceiver. Thus, as in the case of Booth, a stranger who makes no representations as to his identity or loyalties, and receives no confidence, trust or benefit in return, can be said to be treacherous for failing to proclaim himself an enemy, and thereby warn his intended victim. The second line of reasoning appears to arise from an incorrect understanding of the term "war crime" as it was used prior to the end of World War II, and of the concept of an "illegal combatant."

a. war crimes and war treason

At one time, the term "war crime" was understood somewhat differently than it is commonly understood today. It was said to consist of any "hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders."³⁶ War crimes included not only violations of the international law of war, but also acts such as

espionage and "war treason."

War treason was defined as "such acts....committed within the lines of a belligerent as are harmful to him and are intended to favor the enemy."³⁷ Activities within the definition of war treason were not considered forbidden under international law; but, because of the danger they posed to the party against whom they were directed, the threatened belligerent was permitted to punish them. A private individual who committed acts of war treason was always subject to punishment. An enemy soldier who was operating behind the lines of the opposing forces, however, could only be punished if he committed the act while disguised, that is while not wearing his uniform. If acting in uniform, he was entitled to the protected status of a prisoner of war, provided first by customary international law and then under a series of international agreements leading to the 1949 Geneva conventions.³⁸ Thus an enemy soldier who committed acts of sabotage while in uniform behind enemy lines was a protected prisoner of war if captured, but if he wore civilian clothes while conducting his activities

he was guilty of a "war crime" (war treason) and could be punished for such by his captors, even though he had committed no violation of international law. If, however, he wore the uniform of his enemy while acting as a saboteur, he did commit a violation of the international law of war³⁹ and could be tried and punished as a war criminal as that term is commonly understood today. The same analysis would apply if, instead of sabotage, the soldier had engaged in any other activity hostile to the belligerent who captured him.

The use of the term "war treason" to describe hostile acts by civilians and ununiformed soldiers implied that any such acts, including the killing of an adversary, were necessarily in some sense treacherous. It is important, however, to note that the application of the term treason to actions by individuals who owe no allegiance to the party they have offended against was resoundingly criticized:

So-called war treason....must be
distinguished from treason properly so-called

which can only be committed by persons owing allegiance, albeit temporary, to the injured state. The latter can be committed by a member of the armed forces or an ordinary subject of a belligerent. It is not easy to see how it can be committed by an inhabitant of occupied enemy territory, or by a subject of a neutral state....it seems improper to subject the inhabitants of the occupied territory to the operation of a term....based on a nonexistent duty of allegiance.... Moreover it implies a degree of moral turpitude made even more conspicuous by the frequent, though essentially inaccurate, designation of so-called war treason as a war crime.⁴⁰

Clearly the commission of any hostile act, including the killing of an enemy leader, by an inhabitant of occupied territory or by a member of an opposing army would be punishable, but it could not, in itself, be treasonable.

Another group of activities that, like war treason, were punishable as war crimes as that term was once understood, were armed hostilities by those who were not members of the enemy's regular armed forces. Although similar to war treason, irregular warfare generally involved some form of group action, not necessarily within the lines of the party it was directed against. Those who engaged in it, like the soldier who shed his uniform, were not entitled to be treated as prisoners of war if captured, and were sometimes called "illegal" combatants, although "extra-legal" might have been a more accurate characterization. Examples of irregular combatants were members of guerrilla bands or partisan groups. These groups were described as "wag(ing) a warfare that is irregular in point of origin and authority, of discipline, of purpose and of procedure ...lack(ing) uniforms...(and) given to pillage and destruction."⁴¹ They were thought to be "particularly dangerous, because they easily evade pursuit, and by laying down their arms become insidious enemies; because they cannot otherwise subsist than by rapine, and almost always degenerate into simple robbers or brigands."⁴²

Their activities, like war treason, were presumed to be punishable by the party against whom they were directed because of the threat they posed, but it was also occasionally suggested that warfare conducted by irregular, ununiformed "soldiers" violated international law.⁴³

That proposition was far from universally accepted. Both the Brussels Code, and later the Annex to the 1907 Hague Convention, included a provision providing protected status for civilian citizens rising in a *levee en masse* to resist an advancing enemy army,⁴⁴ and for members of organized militias and volunteer corps. However, it was not until the end of World War II, with the then recent example of the resistance movements conducted against German and Japanese occupations, that a consensus arose within the international community recognizing irregular or guerilla combat as a significant and permanent aspect of modern warfare. There was general agreement that members of partisan and guerrilla groups could not justly be considered violators of international law based merely on their participation in irregular

hostilities. For that reason prisoner of war status should be provided unambiguously to individuals belonging to organized resistance groups, provided they met the same criteria required of militia and volunteer corps that had been afforded protection under the Hague Regulations.⁴⁵ Those criteria include the requirements that members carry their arms openly and that they wear a distinctive, identifiable insignia,⁴⁶ in essence, the functional equivalent of a uniform. Many signatories to the 1949 Convention remained profoundly reluctant to provide prisoner of war status to ununiformed combatants.

So long as that reluctance rested on the desire not to be restricted in the ability to punish and thus deter a form of warfare especially difficult to counter, it reasonably followed that irregular combatants who did not meet the requirements for prisoner of war protection did not violate the international law of war by engaging in hostilities, but merely became subject to punishment if captured. That interpretation was supported by the fact that the Convention itself did not require the wearing of

uniforms while engaged in combat, and it was the position taken by most commentators.⁴⁷

Assassination, however, was an exception to that rule. It was the only form of hostile activity, the legality of which seemed to depend on the clothing not worn by the perpetrator. While an ununiformed commando belonging to the enemy armed forces or an irregular resistance fighter was allowed to destroy a bridge or to attack a military installation, it was impermissible for him to attack a single pre-selected individual even if that individual was clearly a combatant and a legitimate target. This conclusion evidently was founded on the assumption that failure to identify oneself as a combatant was treacherous, a conclusion that may have arisen from the fact that hostile acts committed by those not in uniform had customarily been described as war "treason," as discussed earlier. It is curious, however, that while Article 23(b) of the Hague Regulations forbids all killing and wounding of enemy persons by treachery, the flavor of treachery was perceived only when the target was a specific, single individual. It was not considered similarly

treacherous for ununiformed or irregular forces to attack entire enemy military units consisting of many members, all of whom were collectively targets.

b. application of the customary law

The practical application of this conception of the crime of assassination is illustrated by two well known incidents that occurred during World War II. One took place in April, 1943, when United States forces obtained advance intelligence information concerning the precise time that Japanese Admiral Isoroku Yamamoto would fly from Rabaul to Bougainville. Admiral Yamamoto was considered invaluable to Japanese war efforts, and for that reason it was decided to try to shoot down his plane enroute. A squadron of American planes was dispatched for that purpose and Admiral Yamamoto died when his plane crashed in the jungle.⁴⁸ The attack on Admiral Yamamoto clearly was permissible under international law. He was a member of the Japanese armed forces and a combatant. His plane was attacked openly by United States military aircraft. The situation was analogous to that of Pepin, mentioned

earlier, whose attack on the enemy commander under cover of darkness is likewise considered a proper attack on a legitimate target.

A more difficult case is that of SS General Reinhard Heydrich who, while serving as Acting Protector (military governor) of (German occupied) Bohemia and Moravia in 1942, was killed by a British bomb thrown into his car by two members of the free Czechoslovak Army, headquartered in London. The two ununiformed soldiers had parachuted into Czechoslovakia from a British Royal Air Force plane, and after their attack hid with members of the Czech resistance in a Prague church. The Germans surrounded the church and killed everyone inside, reportedly never realizing that the men who had killed Heydrich were among the occupants. That massacre of 120 people was only one element of massive German reprisals against Czech civilians that followed Heydrich's death: another 1331 Czechs were executed, 3000 Jews imprisoned at Theresienstadt were transported to camps in the east for extermination, and the town of Lidice was dismembered.⁴⁹ The incident is a troubling one because

most analyses conclude that the killing of Heydrich was a prohibited assassination under international law and suggest that the Germans would have been entitled, under the law as it was then formulated, to take proportionate reprisals.⁵⁰

The difficulty with that approach is that if assassination is treacherous murder, and treachery requires a betrayal, the nature of the obligation that was betrayed is elusive. Certainly the two individuals who killed Heydrich were bound by no obligation of duty or allegiance either to him or to Germany. Heydrich, as a military officer, was a legitimate target who without question could properly have been the object of an attack such as that which killed Admiral Yamamoto. There was no affirmative misrepresentation by his assailants and no personal trust or confidence obtained and betrayed. The most that can be said is that the two Czech soldiers camouflaged themselves as civilians until the time of their attack, knowing that if the Germans spotted them earlier they would be prevented from accomplishing their purpose. Camouflage under most other circumstances is a legitimate ruse. Had

they hidden inside a parked vehicle along Heydrich's anticipated route or, in classic cartoon fashion, disguised themselves as two trees by the side of the road, there would have been no question but that they were acting within the bounds of international law, and- if wearing uniforms while hiding or under their camouflage- would have been entitled to prisoner of war status if captured.

It follows that neither the Czech government in exile nor the British government can be said to have made use of their (non-existent) treachery to obtain Heydrich's death. There was no independent treacherous betrayal on the part of either government since there was at the time no agreement between Czechoslovakia and Germany that only uniformed combatants would engage in hostilities, nor was that a generally recognized tenet of international law, nor was there any other provision of international agreement or law that would have protected Heydrich from attack. This incident highlights the illogic and inconsistency surrounding the issue of assassination as it traditionally is treated in international law.

C. An Alternative Treatment: Perfidious Attacks

In the years following World War II, as the international community gained experience with guerrilla war and with the terrorism that was frequently associated with it, a new concern was added to the desire of many nations to deter highly disruptive and often effective guerilla warfare. That concern was that the presence of clandestine combatants would endanger the civilian population within which they operated. It is reflected in Articles 37 and 44 of Additional Protocol I to the 1949 Geneva Conventions.⁵¹ Article 44, in particular, was a source of controversy even as it was written,⁵² and a number of nations, including the United States, have not ratified Protocol I.⁵³ Nevertheless, it represents a significant development in the approach of the international community to the issue of hostilities by ununiformed combatants.

Article 44 of the Protocol seeks to establish a requirement, independent of qualifications for prisoner

of war status if captured, that all combatants distinguish themselves from the civilian population while preparing for or engaging in an attack. A combatant who does not wear a uniform or distinguishing insignia because the nature of hostilities prevents it would retain his status as a combatant and would remain entitled to protection as a prisoner of war so long as he carries his arms openly. In addition, Article 37 of the Protocol forbids the killing, injury or capture of an adversary through perfidy, which it defines as:

acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.

It offers as an example of perfidy "the feigning of civilian, non-combatant status."⁵⁴ Article 44 explicitly states that one who, though not in uniform, carries arms openly while preparing for or engaging in hostilities, is not acting perfidiously within the

meaning of article 37.

These two articles are drafted in such a manner that an ununiformed attack on an adversary is perfidious only if weapons are hidden, in which case the attacker loses his status as a combatant. If a combatant, although not in uniform, nevertheless carries his arms openly while attacking his adversary, he would not have engaged in a perfidious attack under Article 37, and would retain combatant status under Article 44. He could be tried only as a prisoner of war for the offense of engaging in combat or preparing for it while undistinguished from the civilian population- which Article 44 makes a violation of international law. If, however, he carried arms clandestinely, he would have violated both Article 44 (ununiformed attack against any target) and Article 37 (perfidious attack upon a person). Additionally, under Article 44 he would lose his status as (or not be considered) a combatant, and could be tried for any crime he had committed under the municipal law of his captor.

It is apparent that the Conference did not intend to supercede Article 23(b) of the Annex to the Hague convention, but considered Article 37 to be broader in its prohibition not only because it added the act of capture to those of killing or injuring, but also because perfidy was considered to include acts of treachery.⁵⁵ Thus, while neither article of the Protocol was intended specifically to address the issue of assassination, their effect is to absorb that concept and treat it as part of a far broader prohibition of perfidious attacks on persons. In so doing, they suggest an alternative approach that better reflects contemporary concern for the mitigation and containment of the horrific effects of war on humanity than does the traditional focus on treachery.

Among the reasons most often cited for prohibitions on the use of perfidy contained in the Protocol, and in international law generally, are considerations of honor and morality among nations, and also the desire to discourage conduct that might make it more difficult to reestablish peaceful relations at a later time.⁵⁶ Perhaps a more pragmatic motivation is

that, if the protections and obligations provided by international law are permitted to become bases of trickery, they will not be observed.⁵⁷ In this context that means that the continued potency of protections established for civilian noncombatants depends upon those protections not being available to shield those who are combatants. The object to be protected is not the targeted adversary, but rather the safety of the civilian population and, more generally, continued confidence in law and international agreements. This rationale provides a far firmer foundation for requiring the wearing of uniforms while attacking the enemy than do attempts to characterize the failure to do so as treacherous. Seen from this perspective, the offense of the two Czech soldiers who killed SS General Heydrich was not that they behaved treacherously or even deceitfully toward him or toward Germany as an occupying power. It was rather that the method chosen to execute their attack endangered civilian noncombatants- both those in the immediate vicinity of the attack, and others who would suffer if efforts to preclude future attacks undermined the observance of legal protections for civilians provided by

international law.

III. ASSASSINATION AS A POLITICAL ISSUE

Discussion of assassination as matter of foreign policy and as a political issue within the United States has been a matter more or less apart from the question of assassination under international law. The subject received some public attention following the assassination of President Kennedy in 1963, largely as a result of allegations that Cuba's Fidel Castro was responsible for Kennedy's death and that Castro had acted in retaliation for attempts by the United States' Central Intelligence Agency (CIA) to arrange Castro's death. The subject also arose in discussions regarding the wisdom of numerous aspects of United States actions in Vietnam, including United States encouragement of a military coup that resulted in the death of South Vietnamese President Ngo Dinh Diem. Assassination did not, however, become a prominent political issue until the mid 1970s, when, in the post Watergate period, allegations that the United States government had been involved in plotting to kill foreign leaders were the

subject of intensive scrutiny as part of congressional investigations of covert activities.⁵⁸

A. Select Committee on Intelligence Activities Interim
Report on Alleged Assassination Attempts

In November, 1975, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities issued an interim report on alleged assassination attempts⁵⁹ in which it found that the United States government was implicated in five assassinations or attempted assassinations against foreign government leaders since 1960. Four of those instances involved plots to overthrow governments dominated by the targeted leaders, the fifth was an attempt to prevent a new government from assuming power. The interim report noted varying degrees of United States involvement. In the case of General Rene Schneider of Chile,⁶⁰ who died of injuries received in a kidnapping attempt in 1970, the Committee found that the CIA had been actively involved in efforts to prevent Salvadore Allende from taking office as Chile's president, and that General Schneider was thought to be

an obstacle to that goal. It further found that the CIA had provided money and weapons to a number of anti-Allende military officers, including the group that attempted to kidnap General Schneider. CIA support, however, was withdrawn from that particular group before the attempt was made, although the CIA had continued to provide support to other Chilean dissident groups. In the case of President Diem,⁶¹ the United States had encouraged and assisted a coup by South Vietnamese military officers in 1963, but it appeared that Diem's death in the course of the coup was unplanned and occurred without prior United States knowledge. In the Dominican Republic,⁶² the United States had supported and provided small numbers of weapons to local dissidents with knowledge on the part of some United States officials that the dissidents intended to kill Rafael Trujillo. It was unclear whether the weapons were intended for use or were used in the assassination. In two other cases,⁶³ however, the Committee concluded that the Central Intelligence Agency had actively and deliberately planned to kill foreign leaders. In both cases, it was unsuccessful: the Congo's (now Zaire) Premier Patrice Lumumba was

ultimately killed by individuals with no connection to the United States, and Fidel Castro survived.

1. Discussion by the Committee

The Committee's discussion, together with other findings and conclusions based upon the circumstances of those five cases are instructive. The Committee was of the opinion that, short of war, assassination should be rejected as a tool of foreign policy, citing as the primary reason the belief that assassination "is incompatible with American principle, international order and morality."⁶⁴ It also noted, however, the difficulty in predicting the ultimate effect of killing a foreign leader- pointing out, for example, the danger that political instability following his death might prove to be an even greater a problem for the United States than was the leader himself; the demonstrated inability of a democratic government to ensure that covert activities remain secret; and the possibility that use of assassination by the United States would invite reciprocal or retaliatory action against American leaders.⁶⁵ Further, the Committee made two

important distinctions with regard to plots to overthrow foreign governments.⁶⁶ The first distinction was between those plots that were initiated by the United States, and those that involved the United States only in response to a request by local dissidents for assistance. The second distinction was between those plots that had as an objective the death of a foreign leader, and those in which the leader's was not intended but was a reasonably foreseeable possibility. The interim report commented:

Once methods of coercion and violence are chosen, the possibility of loss of life is always present. There is, however, a significant difference between a coldblooded, targeted, intentional killing of an individual foreign leader and other forms of intervening in the affairs of foreign nations.⁶⁷

While asserting unequivocally that targeted assassinations instigated by the United States should be prohibited, the Report nonetheless observed:

Coups involve varying degrees of risk of assassination. The possibility of assassination....is one of the issues to be considered in determining the propriety of United States involvement....This country was created by violent revolt against a regime believed to be tyrannous, and our founding fathers (the local dissidents of that era) received aid from foreign countries....we should not today rule out support for dissident groups seeking to overthrow tyrants.⁶⁸

In addition to questioning the propriety of United States involvement in activities of this nature, the interim report expressed profound concern over the manner in which they were authorized.⁶⁹ The Committee was repeatedly frustrated in its attempts to ascertain precisely where authority originated. It believed that efforts to maintain "plausible deniability" within the government itself, the deliberate use of ambiguous and circumlocious language when discussing highly

sensitive subjects, and imprecision in describing precisely what sorts of action were intended to be included in broad authorizations for covert operations, produced a breakdown of accountability by elected government and created a situation in which momentous action might have been undertaken by the United States without ever having been fully considered and authorized by the president.

2. Recommended legislation

Based on its findings the Committee recommended legislation that would have made it a criminal offense for anyone subject to the jurisdiction of the United States to assassinate, attempt to assassinate or conspire to assassinate a leader of a foreign country with which the United States was not at war pursuant to a declaration of war, or engaged in hostilities pursuant to the War Powers Resolution.⁷⁰

Despite three different legislative proposals placed before Congress between 1976 and 1980,⁷¹ no statute materialized. It has been suggested that the

failure of Congress to enact legislation forbidding assassinations might be interpreted as implicit authority for the president to retain such action as a policy option.⁷² More likely it reflected reluctance on the part of Congress to reopen debate on a very sensitive subject that would prove divisive, highly controversial and on which the outcome was uncertain.

B. Executive Order 12333

Instead, in 1976, President Ford issued an executive order which barred United States government employees or agents from engaging or conspiring to engage in assassination. That prohibition was reissued without significant change by Presidents Carter and Reagan, and is now embodied in Executive Order 12333 pertaining to United States intelligence activities, which reads:

2.11 Prohibition on Assassination. No person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.

2.12 Indirect Participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this order.⁷³

The order contains no definition or further elaboration of what constitutes assassination. The context in which it was promulgated suggests that it was understood to apply to circumstances similar to those that had recently been the subject of investigation; that is, peacetime efforts by United States intelligence agency officials to cause the deaths of certain foreign persons whose political activities were judged detrimental to United States security and foreign policy objectives, and that its intent was to address concerns similar to those expressed by the Senate Select Committee in its interim report. Nonetheless, it is reasonable to believe that the vagueness surrounding the meaning of the term assassination was deliberate, or at least considered desirable. In forbidding, and by clear implication forswearing, the use of assassination in general rather than specific terms, the order responded to intense

political pressure to "do something" while maintaining flexibility in interpreting exactly what had been done. In so doing, President Ford and his successors may have prevented legislation on the subject which likely would have been far more specific, and, given the political climate at the time, far more restrictive. There is, of course, also an advantage in leaving potential adversaries unsure as to exactly what action the United States might be prepared to take if sufficiently provoked.⁷⁴

1. Interpretations

Whether the uncertainty regarding the intended meaning of the word "assassination" was inadvertent or deliberate, its effect on domestic political discussion has been to invite interpretations significantly more restrictive than the legislation originally proposed in the Senate Select Committee's Interim Report, and certainly more restrictive than required by international law. Disregarding any distinction between peacetime and times of conflict, those who argue for the broadest interpretation evidently believe

that the executive order prevents the United States government from directing, facilitating, encouraging or even incidentally causing the killing of any specified individual, whatever the circumstances.

Discussion of this subject has often been more emotional than rational. A 1986 essay characterized the word assassination as one that "get(s) stuck in our throats," as it is "hissed rather than spoken."⁷⁵ Former CIA Director Robert Inman has described assassination as a "cowardly approach to cowardly acts."⁷⁶ Others assert that "a free society will tolerate killing civilians in bombing raids but not government-sanctioned murder."⁷⁷ Despite the sincerity with which such views are held, they cannot obscure the fact that by any definition of assassination must incorporate the idea of an illegal killing: what is not murder cannot be assassination. In addition, assassination requires a selected individual as a target as well as a political rather than private purpose.

2. Legal implications

The President has the authority, through the National Security Council, to direct the CIA "to perform other functions and duties related to intelligence affecting the national security."⁷⁸ This has been interpreted to include authority to order covert activities,⁷⁹ which sometimes violate the laws of the country in which they take place, and some of which involve the use of force or violence. The President's freedom to act in this area has been somewhat restricted by measures designed to increase congressional oversight of covert activities, but those restrictions are more procedural than substantive.⁸⁰ Assuming the President made the required finding that a given course of action was important to national security,⁸¹ and assuming appropriate reports were provided to Congress,⁸² a covert operation that involved the killing of a specific foreign leader or other person would not be illegal under United States law. The existence of Executive Order 12333 does not significantly alter that conclusion. It is subject to modification or rescission by the President at any time; and indeed a proper finding by the President coupled

with direction to an intelligence agency to procure the death of a foreign official would arguably result in the constructive rescission of any conflicting provision of Executive Order 12333. Such action very likely would, however, provoke emphatic protests from Congressional overseers that they had been misled with regard to administration policy, and that the policy had been changed without adequate prior notification and consultation.

The true effect of the executive order is neither to restrict in any legally meaningful way the President's ability to direct measures he determines to be necessary to national security, nor to create any legal impediment to United States action that can be said to constitute assassination. Instead the order ensures that authority to direct acts that might be considered assassination rests with the President alone. It prohibits subordinate officials from engaging on their own initiative in such activities, and makes clear that should they stray into questionable territory, they do so at their own risk. In this way it discourages the establishment of

"plausible deniability" within the government, which caused such difficulty for congressional investigators seeking to trace ultimate responsibility for activities of the 1960s and early 1970s. Finally, it constitutes a statement- albeit an ambiguous one- of administration policy, made in a manner that precludes, or makes very difficult, changes in that policy without prior consultation with Congress. Attempts to narrow the definition are actually efforts to exclude certain acts from those which the President has assured Congress he will not undertake, and are seen by many as a surreptitious attempt to narrow the scope of that assurance. It is in the context of this last function that debate over the definition of assassination must be understood.

III. ASSASSINATION AS A USE OF FORCE

1. Iraq

Returning to the dilemma of Iraq, discussed in the introduction to this paper, it is apparent that application of Executive Order 12333 is inappropriate.

The Executive Order explicitly addresses the conduct of intelligence activities, while United States action against Iraq was military in nature. Moreover, the Senate Select Committee, in its proposed legislation, had itself recommended that wartime activities be excluded from any statutory ban on assassinations.

Under international law as it pertains to armed conflict, an overt attack against the person of Saddam Hussein, carried out by uniformed members of the opposing armed forces would have been entirely permissible. The United States and its allies had explicit authority from the United Nations both to threaten and ultimately to use force against Iraq,⁸³ and there is no doubt that a state of war existed between the United States and its allies, and Iraq. There being no dispute concerning the legality of using force, there can likewise be no dispute that Saddam Hussein, as commander of the Iraqi armed forces, was as legitimate a target as was Admiral Yamamoto: both were enemy combatants.

This is not, of course, to say that a deliberate

effort to kill Saddam Hussein necessarily would have been wise. There were good arguments to be made that such an attempt would likely have failed and become a source of embarrassment, that it might have had an effect contrary to the desired one of avoiding or hastening the end of the conflict, or that the long-term consequences of Saddam's death would have been less desirable than those of allowing the opposing forces to reach a conclusion in battle. But those are questions of policy, not subject to legal analysis.

Whether international law would have permitted the Iraqi President to be the subject of a covert attack by ununiformed commandos or civilian agents again raises the issue of ununiformed attacks discussed earlier. It would seem that the answer must be no: under the traditional view as it has evolved, because such an attack would be treacherous; applying Protocol I, because combatants who claim the protection of a false civilian identity act perfidiously. There is, however, a countervailing principle which applies to any lawful use of defensive force; that is, that it be applied only when necessary, and that its magnitude be

proportionate to the task at hand.⁸⁴ That principle suggests that a covert attack should be allowed.

For discussion, assume that it could have been known with certainty that Saddam's death could be brought about and that it would avoid or significantly shorten the war, thus preventing massive destruction in Iraq and Kuwait and thousands of military and civilian casualties. Assume also that it was apparent an overt attack could not succeed. It then appears that the interest in avoiding treacherous killing and preserving the benefit of protection for civilian populations conflicts directly with the desire to avoid unnecessary suffering, damage and loss of life by ensuring that only necessary and proportionate force is used. One response to that dilemma might be to argue that an attack by other than uniformed combatants is illegal under international law, and therefore is not available as an option; thus the battle that will kill thousands is indeed necessary. It is a resolution that seems inherently unsatisfactory. An alternative means of resolving the apparent contradiction, at least with regard to Protocol I's requirement that combatants

distinguish themselves from the civilian population, might be to consider that article 44 of Protocol I was intended primarily to apply to combatants engaged in guerilla warfare.⁸⁵ Under ordinary circumstances, international law does not generally undertake, or consider it necessary, to protect civilian populations from their own governments. It follows logically that the requirement for a uniform or distinguishing insignia, and by extension article 37's equation of ununiformed attack with perfidy, should apply only in situations involving guerilla warfare and, by analogy, in occupied territory, both of which involve circumstances that require special protection of civilians. Such an interpretation would (absent guerilla war) allow an ununiformed attack upon an enemy combatant within his own country, while continuing to promote international legal protection of populations that a belligerent is likely to perceive as hostile.

2. Libya

Assassination was also an issue in the April 1986 United States air attack on Libya. That attack was

directed against military targets in Tripoli and Benghazi, including Colonel Muammar Qaddafi's headquarters in the al-Azziziya Barracks. The Libyan government reported that 36 civilians and one soldier died. Other reports estimated the actual number to be at between fifty and one hundred, primarily military personnel. Colonel Qaddafi, in an underground bunker at the time, was unharmed.⁸⁶

In reporting this action to the United Nations Security Council pursuant to Article 51 of the United Nations Charter, the United States indicated that the attack was made in self defense, in response to "an ongoing pattern of attacks by the government of Libya," the most recent of which had been the bombing of a Berlin discotheque earlier that month.⁸⁷ The Berlin attack injured over two hundred people, fifty of them Americans, and killed two others, one an American soldier. Although the issue was one of some controversy, it appears that the United States had credible and convincing evidence that the Libyan government was in fact responsible for the discotheque bombing; and that the bombing was the latest in a

series of incidents, backed by Libya, involving attacks against American citizens.⁸⁸ Previous pronouncements by Colonel Qaddafi, indicated that such attacks could be expected to continue.⁸⁹

While Reagan administration officials cited deterrence and a desire to destroy Libya's ability to support future attacks by damaging its terrorist infrastructure as motivations for the air strikes,⁹⁰ critics alleged that, in fact, at least one objective had been to kill Qaddafi. If so, the critics charged, the attack was illegal because the executive order had been violated. Some went so far as to suggest that, even if Qaddafi had not been a target, the failure to take precautions to ensure that he was not injured or killed in the attack constituted a violation of the executive order.⁹¹

As was true with regard to the Iraqi situation, the situation in Libya involved, not intelligence activities, but rather the application of military force. Thus, application of the executive order is inappropriate. A more useful approach is to consider

first whether the United States was justified in using force against Libya, and then to examine whether the nature of the force used was appropriate. Briefly stated, the legal argument supporting the attack was that, although the right to engage in peacetime reprisals was expunged by adoption of the general ban on the use of force contained in Article 2(4) of United Nations Charter, and the single terrorist assault on the Berlin discotheque may not have been sufficient to rise to the level of an armed attack, Libya's conduct over time, regarded in its entirety, constituted a continuous and on-going attack against United States nationals, against which the United States was entitled to defend itself.⁹²

If one accepts that a forcible, military response was justified, then the nature and magnitude of the force used must be considered. Accepting for discussion that Colonel Qaddafi was a target of the United States attack, as a member and commander in chief of Libya's armed forces he, like Saddam Hussein, was an enemy combatant and therefor a legitimate object of attack. The attack itself was an open one by

uniformed members of the United States armed forces, clearly neither "treacherous" nor "perfidious." A question left unasked, perhaps due to the inclination of critics to define the issue as one of assassination, is one suggested by Vattel: whether an attack directed against Qaddafi, who was Libya's head of state in addition to being a military leader, caused what would otherwise have been a proportionate response to recurring Libyan attacks against United States citizens, to become disproportionate. That question may well be unanswerable. Certainly it is true that the impact of the death of a national leader on a nation may far exceed that of the death of a person who is a military commander only. To weigh proportionality, however, appears to require answers to other questions, such as how many private lives equal the value of the life of one head of state, and whether alternative actions might be as effective in defending United States citizens. Yet, as difficult as those issues are, they appear better to reflect contemporary concern for minimizing the horror and destruction caused by war than do attempts to define and prevent treachery.

3. Panama

A more difficult situation is presented by the failed coup attempt against Panama's General Manuel Noriega in October, 1989.⁹³ Tension between the United States and Panama had been growing since shortly after General Noriega took control of the Panamanian Defense Force and the government of Panama in 1983, but did not assume major importance until 1988 when General Noriega was indicted on narcotics charges in Federal Court in Florida. The United States was concerned not only with regard to General Noriega's assistance to and participation in the narcotics trade, but also gun smuggling and other illicit activities, as well as issues relating to the Panama Canal, required by treaty to be turned over to the government of Panama in 1999. In July 1988, President Reagan had authorized the Central Intelligence Agency to provide assistance to certain Panamanian military officers seeking to remove General Noriega from power. The Senate Intelligence Committee objected because it feared that Noriega might be killed, a possibility it viewed as a potential

assassination and a violation of Executive Order 12333. In October 1989, a revolt within the Panamanian armed forces failed to oust General Noriega after receiving minimal United States support. United States officials indicated that additional help was not provided because it was not requested, but also pointed to Congressional disapproval of efforts to provide assistance the previous year. Two and one half months later, following additional provocations by the Panamanian government, including a declaration by General Noriega that "a state of war" existed with the United States, and further attacks on United States personnel resulting in the death of an American officer,⁹⁴ United States forces invaded Panama and removed General Noriega: a result that might have been achieved by means of the military coup.

The issue presented with regard to United States options in Panama in October 1988 differs significantly from that posed by the air attack on Libya or by consideration of options which might have been pursued against Saddam Hussein. Libya and Iraq involved the undisguised application of military force. In Panama,

no decision had yet been made to apply force directly to remove Manuel Noriega. Instead, the question was the extent to which the United States should respond to requests from dissident Panamanians within the Panamanian Defense Force seeking to depose General Noriega. Those individuals were part of an active and very vocal Panamanian opposition to Noriega's rule which, while evidently reflecting the desires of a majority of the population, had repeatedly failed in its attempts to remove him using a democratic process that Noriega had repeatedly subverted, his refusal to recognize the results of elections held in May 1989 being only one example.⁹⁵ Further, indications are that those Panamanians seeking to remove General Noriega from power sought exactly that; their plans did not include Noriega's death as an objective, although if it became necessary to kill him in the course of achieving their objective, they were prepared to do so. The fact that Noriega had previously demonstrated his intent to forcibly resist any attempt to remove him made it quite possible that he would be a casualty of any coup.⁹⁶

Unlike that in Iraq and Libya, the situation in Panama does appear to have been of the sort contemplated by Executive Order 12333. With reference to the Senate Select Committee's Interim Report, however, two points should be noted. First, the proposed coup was instigated by Panamanians and was intended to depose Noriega, not necessarily to kill him. Second, it involved the kind of assistance to those struggling against "tyrannous regimes" which the Committee had been unwilling to rule out. Examined in this light, once a decision to provide assistance was made, it would be naive at best on the part of the United States to have insisted that as a condition for receiving such help, the Panamanians provide guarantees that no harm would come to General Noriega. While the United States could reasonably seek assurances that coup leaders sought only Noriega's removal, and that efforts to punish him would be confined to appropriate legal means, for Congressional and other critics to demand more does indeed suggest an unrealistic view of violent political change. The Senate Select Committee was correct: the personal fate of a leader under such circumstances is a factor to be considered, but should

not in itself be determinative.

The greatest legal vulnerability of an attempt by the United States in October, 1989, to assist dissident Panamanians against General Noriega was in the context of international law. The issue was not assassination, but rather intervention by the United States in the internal affairs of Panama. It received little discussion, perhaps because by the fall of 1989, there was consensus within the United States that Noriega was sufficiently noxious to justify the risk of international disapproval.

IV. CONCLUSION

The customary treatment of assassination under international law is in most cases unnecessary to, or in contradiction with, contemporary concerns regarding the use of force in armed conflict. It developed during an era in which the waging of war was considered an intrinsic right of nations and kings, when respect for personal honor and loyalty to one's sovereign was paramount and when wars, by today's standards, produced

relatively little harm. As is true of law generally, the customary provisions concerning assassination served to protect and preserve those things that were important to the society in which they originated.

Changes in society, together with changes in the nature of warfare and the magnitude of destruction it is capable of causing have changed the focus of the law of war. Less concerned than in the past with detailed rules as to how wars are to be fought, today's law attempts first to prevent the outbreak of war, and then, should those efforts fail, attempts to limit the resulting damage and bring the fighting to as rapid an end as possible. In this context, it makes little sense to preserve a special and unique provision of law that protects the lives of single individuals, regardless of their prominence, at the possible expense of the lives and well-being of hundreds or thousands of others.

Similarly, in the context of domestic law and United States policy it serves little purpose to rule out any particular action as a future option when the

issues and circumstances that may then be present are as yet unknown. There is no longer, if indeed there ever was, a clear demarcation between a state of peace and one of war. Instead, we see varying degrees of justification for the use of force when a nation's vital interests are attacked. There is a tendency to believe that mistakes in government can be avoided if only a law is passed- or at the very least, a rule promulgated- prohibiting them. In this context the result has been a rule, embodied in Executive Order 12333, designed to assure Congress and the public that unpopular and ill-conceived policies undertaken in the 1960s and early 1970s will not be repeated. In attempting to prevent a repetition of the past, however, the rule would limit the flexibility of policy makers in responding to current and future situations which may differ in significant aspects from those that gave rise to it. No law can prevent bad policy, much less guarantee that decisions made by government will be wise. Indisputably, the foreign policy of the United States requires the best judgment of the President and Congress. The circumstances that they will confront in the future and the competing interests

and values they will be required to weigh cannot be foreseen in more than the most general terms. Having elected those who presumably have the judgment and ability to make such decisions, it is counterproductive for the nation to restrict their ability to do so.

1. One prominent example was Air Force Chief of Staff Michael J. Dugan, relieved in September 1990, after having told journalists that, in the event of war, the United States would launch an intensive air campaign in which Saddam Hussein would be a target. L.A. Times, Sep. 18, 1990, at A1, col. 6; see also Turner, Killing Saddam: Would it be a Crime? Washington Post, Oct. 7, 1990, at D1, col. 5; Charen, Kuwait isn't the Issue, Hussein Is, Newsday, Nov. 26, 1990, at 80.
2. Exec. Order No. 12333, 3 CFR 200 (1982), reprinted in 50 U.S.C. sec.401 at 44-51 (1982).
3. U.N. Charter art. 2, para. 4.
4. U.N. Charter art. 51.
5. A. Gentili, De Iure Belli Libri Tres (1612), reprinted in 16(2) The Classics or International Law 166 (J. Rolfe trans. 1933).
6. Id. at 171.
7. Id. at 171-172.
8. Id. at 170-171.
9. H. Grotius, De Jure Belli ac Pacis Libri Tres (rev. ed. 1646), reprinted in 3(2) The Classics of International Law 653 (F. Kelsey trans. 1925).
10. Id. at 653-654.

11. Id. at 655, n. 2.
12. Id. at 654.
13. Id. at 654-655.
14. Id. at 656.
15. Id. at 633.
16. Id.
17. E. de Vattel, Law of Nations (1758) at 358 (J. Chitty ed./trans. 1883).
18. Id. at 363. Vattel, writing in the 18th century, accepted as matter of course that nations warred against each other even when the safety and existence of the state were not jeopardized. Note, however, that he applied the concept of proportionality to the force used in such conflicts.
19. Id.
20. Id. at 359.
21. Id. at 360-361.
22. Id. at 359.
23. C. van Bynkershoek, Quaestionum Juris Publici Libri Duo (1737), reprinted in 14(2) The Classics of International Law at 16 (T. Frank trans. 1930).
24. Id.

25. Reprinted in 2 The Law of War, A Documentary History 184 (L. Friedman ed. 1972).
26. Id. at 152.
27. 11 Op. Att'y Gen. 297 (1865).
28. Id. at 316.
29. Army Reg. 27-10, U.S. Army Field Manual: The Law of Land Warfare, para. 31 (1956); British Manual of Military Law, Pt. III, sec. 115, n. 2 (1958).
30. 2 L. Oppenheim, International Law, A Treatise, sec. 108 at 156 (H. Lauterpacht 7th ed. 1952).
31. Id. sec. 117 at 153.
32. The British Manual of Military War, supra note 29, suggests that the customary prohibition on assassination may not be considered identical with Art. 23(b) of the annex to the Hague Convention. It lists as separate acts that are not lawful acts of war, assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army. Further, it defines "enemy agents or partisans" as illegal combatants- those not members of organized resistance groups or a levee en masse and who are

therefore not entitled to prisoner of war status if captured.

33. 2 A. Keith, *Wheaton's International Law* 207 (7th ed. 1944).

34. *British Manual of Military Law*, supra note 29; M. Greenspan, *The Modern Law of Land Warfare* 317 (1959).

35. Comment, Assassination in Wartime, 30 *Mil. L. Rev.* 101 (1965).

36. 2 L. Oppenheim, supra note 25, sec 251 at 566.

37. Id. sec. 255 at 575.

38. Id. at 575-576; see also Trial of Generaloberst Nikolaus von Falkenhorst, Case No. 61, British Military Court, Brunswick, XI Law Reports of Trials of War Criminals 18, 27 (1949) (indicating that commando operations behind enemy lines would "probably" be punishable as war treason if performed by members of a belligerent's armed forces while wearing civilian clothes). The origin of the assumption that a member of the enemy armed forces, otherwise entitled to be treated as a prisoner of war, loses the protection of that status if he engages in hostilities out of

uniform, is unclear. It is not contained within the terms of the Geneva Convention.

39. 2 L. Oppenheim, supra note 25, sec 163, at 429.

40. Id. sec. 162, at 425-426; see also Trial of Generaloberst Nickolaus von Falkenhorst, supra note 33 at 28, in which the court distinguished between war treason and a war crime in the contemporary sense, and observed that both might be punished by the perpetrator's captor.

41. 3 C. Hyde, International Law sec. 652 at 1797 (1945).

42. 2 F. Lieber, Miscellaneous Writings 289 (1880).

43. 11 Op. Att'y Gen. 297, 316: ("The law of nations which is the result of the experience and wisdom of the ages, has decided that jayhawkers, banditti, etc., are offenders against the laws of nature and of war").

44. Baxter, So-Called Unprivileged Belligerency: Spies, Guerrillas and Saboteurs, 28 Brit. Y.B. Int'l L. 323, 334 (1951).

45. Id. at 335.

46. Geneva Convention Relative to the Treatment of Prisoners of War, 1949, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135.

47. Comment, supra note 35, at 106.
48. Id. at 102-103.
49. W. Shirer, The Rise and Fall of the Third Reich 991 (1960).
50. British Manual of Military Law, supra note 29, at n. 1.
51. Protocol I Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, Opened for signature Dec. 12, 1977, 1125 UNTS 3, reprinted in International Committee of the Red Cross, Protocols Additional to the Geneva Conventions of 12 August 1949 (1977) [hereinafter Protocol I].
52. International Committee of the Red Cross, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (Y. Sandoz, C. Swinarski & B. Zimmermann eds. 1987) [hereinafter Commentary].
53. Aldrich, Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions, 85 Am. J. Int'l L. 1 (1991).
54. Protocol I, supra, note 51. Other given examples of perfidy are feigning an intent to negotiate under a

flag of truce or of surrender, feigning incapacitation by wounds or sickness, and feigning protected status by the use of signs, emblems or uniforms of the United Nations or states not parties to the conflict.

55. Commentary, supra note 52, para. 1491 at 432.

56. Id. para. 1497-1500, at 434-436.

57. M. Greenspan, *The Modern Law of Land Warfare* 319 (1959).

58. Damrosch, Covert Operations, 83 Am J. Int'l L. 795 (1989).

59. S. REP. No. 465, 94th Cong., 1st Sess. (1975) [hereinafter Interim Report].

60. Id. at 256, 262.

61. Id. at 256, 261.

62. Id. at 256, 262.

63. Id. at 255-256, 263-264.

64. Id. at 1.

65. Id. at 281-282.

66. Id. at 5-6.

67. Id. at 6.

68. Id. at 258.

69. Id. at 6-7, 260-279.

70. Id. at 281-284.

71. Note, The Legality of Assassination as an Aspect of Foreign Policy, 27 Va. J. Int'l L. 656, 685-686, n. 195 (1987).
72. Damrosch, supra note 58, at 801.
73. Exec. Order No. 12333, supra note 1. Earlier versions were Exec. Order No. 11905, 3 CFR 90 (1977), reprinted in 50 U.S.C. sec. 401 at 1848-1854 (1976); and Exec. Order No. 12036, 3 CFR 112 (1979), reprinted in 50 U.S.C. sec. 401 at 1576- 1582 (Supp. III 1979).
74. Newman and van Geel, Executive Order 12333: The Risks of a Clear Declaration of Intent, 12 Harv. J. L. & P. Pol'y 434, 443-447. The authors use game theory analysis to demonstrate that a nation having a declared policy precluding the use of assassination is more likely to be the subject of assassination by other nations; however the article disregards the fact that a nation with a no-use policy which has been the subject of assassination can retaliate by other means.
75. B. Jenkins, Should Our Arsenal Against Terrorism Include Assassination? (1986)
76. Shapiro, Assassination: Is It a Real Option? Newsweek, April 29, 1986 at 21.
77. Id.

78. National Security Act of 1947, 50 U.S.C. sec. 403 (1988).

79. Interim Report, supra note 59, at 9.

80. Damrosch, supra, note 58.

81. 22 U.S.C. sec 2422 (1988) provides that appropriated funds may not be expended by the CIA for covert activities abroad unless the President first finds that the action is important to the national security of the United States.

82. 50 U.S.C. sec.413(a)(1) (1988).

83. SC Res. 678 (Nov. 29, 1990), reprinted in 29 ILM 1565 (1990).

84. M. McDougal & F. Feliciano, Law and Minimum World Public Order 241-244 (1961).

85. Commentary, supra, note 52 at 521-522.

86. E. Schumacher, The United States and Libya, Foreign Affairs, Winter 1986/87 at 335.

87. Letter from Herbert S. Okun, Acting United States Permanent Representative to the United Nations Security Council (April 14, 1986), reprinted in Leich, Contemporary Practice of the United States, 80 Am. J. Int'l L. 612, 632 (1986).

88. Turndorf, The United States Raid on Libya: A Forceful Response to Terrorism, 14 Brooklyn J. Int'l L. 187 (1988).
89. Id. at 191.
90. Letter from Vernon A. Walters, United States Permanent Representative to the United Nations (April 15, 1986), reprinted in Leich, supra note 287, at 633.
91. Note, supra note 71, at 690 n. 245.
92. Turndorf, supra, note 88; Wallace, The Unilateral Use of Coercion Under International Law: A Legal Analysis of the United States Raid on Libya on April 14, 1986, 37 Naval L. Rev. 49 (1988).
93. Robinson, Dwindling Options in Panama, 68 Foreign Affairs 185 (Winter 1989/1990).
94. Terry, Law in Support of Policy in Panama, 43 Naval War College Rev. 110, 111 (Aut. 1990).
95. Robinson, supra note 93, at 190-199.
96. Justice Department Studying U.S. Role in Coups, N.Y. Times, Nov. 5, 1989, Sec. 1 at 11, col.1.